

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LOGAN MARR, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 01-224-B-C
)	
STATE OF MAINE DEPARTMENT OF)	
HUMAN SERVICES, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION ON MOTION TO DISMISS

Plaintiffs, the estate of Logan Marr and her mother, Christy Marr, brought this action for money damages against numerous defendants, including the Department of Human Services (the “Department”), an agency of the State of Maine. The Department has moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docket No. 12.) I recommend that the Court **GRANT** the motion.

12(b)(6) STANDARD

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiffs’ favor, and determine whether the complaint, when taken in the light most favorable to the non-movant, sets forth sufficient facts to support the claim for relief. Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998).

BACKGROUND

The complaint in this case, stretching over sixty-seven pages, contains 481 separate paragraphs and asserts twenty-seven separate causes of action against ten named defendants and various John and Jane Does and XYZ Corporations. It appears to me that the Department is the actual named defendant in at least three of the first ten counts that allege civil rights violations (the first, second and fifth causes of action) and in the twelfth cause of action that alleges a breach of contract by the Department vis-à-vis its contractual undertaking with the federal government under the terms of the Title IV-E State Plan, a contractual undertaking relating to federal funding for the State's foster care program. The Department is also named as a defendant in the thirteenth, fourteenth, sixteenth, and seventeenth causes of action, all of which allege state law claims, including gross negligence, assault, wrongful death, and intentional infliction of emotional distress.¹ The operative facts giving rise to these various causes of action are found under the third section of the complaint entitled General Allegations (Compl. ¶¶ 1-160) and, as they relate to the Department, can be fairly easily summarized.

Logan Marr was placed in the custody of the Department on March 8, 2000, pursuant to orders entered in the Maine District Court in connection with child protection proceedings initiated by the Department. (Id. ¶ 2.) The Department placed her in the foster care of Sally Schofield and it is alleged that Logan died on January 31, 2001, of asphyxiation at the hands of Sally Schofield. (Id. ¶ 3.)

¹ The Department suggests that it is also a named defendant in the eighteenth cause of action alleging slander and libel and in some of the first ten causes of actions (other than the three identified above) all of which allege civil rights violations against various defendants. Plaintiffs' reply does not clarify the precise counts applicable to the Department. The analysis regarding the Department would be the same for all of the civil rights counts and all of the state law claims. The third party beneficiary claim in the breach of contract cause of action is addressed separately. The parenthetical on that cause of action does not name the Department, but a fair reading of the claim suggests that the Department, in addition to certain named individuals, is a named defendant.

With respect to the allegations pertaining to the Department's employees, the complaint alleges, first, that the affidavit supporting the initial child protection petition was perjurious. (Id. ¶¶ 15-22.) The complaint further alleges that the placement of the child was improper in the Schofield home because that home was not licensed as a foster home by the State and because Schofield was an employee of the Department at the time of the placement. (Id. ¶¶ 35, 54-60.) Monitoring of the placement by Department employees is also alleged to have been deficient. (Id. ¶¶ 23, 35, 45.) According to the allegations the child complained that she had been the victim of an assault by Schofield but those complaints were not investigated. (Id. ¶¶ 25-26, 28.) The Department's supervisory staff allegedly failed to properly investigate, train, and supervise Department personnel. (Id. ¶¶ 34, 35, 44, 45, 52, 64, 139, 449, 469.) Furthermore, Commissioner Concannon's statements after the death of Logan Marr were allegedly defamatory of the child's mother Christy Marr. (Id. ¶¶ 147 –48.) Finally, the Department breached its Title IV-E State Plan, a contractual undertaking with the federal government to support federal funding of its foster care program, by placing the child in an unlicensed foster care home. (Id. ¶¶ 320, 322.)

DISCUSSION

A. Federal Civil Rights Claims: Counts One through Ten

Plaintiffs' federal civil rights claims, brought pursuant to 42 U.S.C. § 1983, allege violations of various substantive and procedural due process rights protected by the Fourth and Fourteenth Amendments to the United States Constitution. "To state a claim under section 1983, a plaintiff must allege two elements: 1) that the conduct complained of has been committed under color of state law, and 2) that this conduct worked a denial

of rights secured by the Constitution or laws of the United States.” Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir. 1999) (citing Martinez v. Colon, 54 F.3d 980, 984 (1st Cir. 1995)). With regards to this second element the plaintiffs must also demonstrate that the defendants’ conduct was the cause of the right’s deprivation. Soto v. Flores, 103 F.3d 1056, 1062 (1st Cir. 1997).

The first element is clearly met here; the Department’s actions were all taken under color of state law. As for the second element plaintiffs assert that the rights that have been violated arise directly under the Constitution. For purposes of this decision only, I will assume that the plaintiffs’ allegations of the death of the child at the hands of state actors while the child was in state custody is a deprivation of a right secured under the Constitution, compare DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989); Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 990-92 (1st Cir. 1992) with DeShaney, 489 U.S. at 201 n.9; Germany v. Vance, 868 F.2d 9, 15 (1st Cir. 1989), without pausing to parse the substantive and procedural due process claims alleged in each count, a task that can be nettlesome, see, e.g., County of Sacramento v. Lewis, 523 U.S. 833 (1998); Hasenfus v. LaJeunesse, 175 F.3d 68, 70-73 (1st Cir. 1999); Soto, 103 F.3d at 1062-64, and is unnecessary to undertake for purposes of this motion to dismiss.

The Constitutional analysis is unnecessary because there is one other threshold requirement that must be met to maintain an action for money damages pursuant to § 1983. The defendant must be a “person” within the statute’s reach. The Department has moved to dismiss the civil rights causes of action brought against it relying upon the well-known doctrine that a state is not a “person” within the meaning of 42 U.S.C.

§ 1983. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 67-68 , 71 (1989). The Will holding applies to states, state officials acting in their “official capacity,” or governmental entities that are considered "arms of the State" for Eleventh Amendment purposes. 491 U.S. at 70-71. See also Johnson v. Rodriguez, 943 F.2d 104, 108 (1st Cir.1991) (“It is settled beyond peradventure ... that neither a state agency nor a state official acting in his official capacity may be sued for damages in a section 1983 action.”); Rawlings v. Iowa Dep’t of Human Servs., 820 F.Supp. 423, 427 (S.D. Iowa 1993) (“[B]ecause a state agency was a party to the case [the Will decision] must be construed as implicitly holding that state agencies are also not persons under § 1983.”). The Maine Department of Human Services is a governmental entity that is an “arm of the State”. For this reason the § 1983 causes of action against the Maine Department of Human Services must be dismissed for failure to state a claim.

B. Federal Statutory/Third Party Beneficiary Claim

Plaintiffs’ cause of action in Count Twelve presents some initial analytical problems. The count appears to be brought in connection with the “Maine Title IV-E State Plan” and alleges a common law cause of action for breach of contract brought by the plaintiffs as third-party beneficiaries. The State explains in its memorandum that the “Maine Title IV-E State Plan” arises under the Adoption Assistance and Child Welfare Act (AACWA), inter alia 42 U.S.C. §§ 670 – 679b (West Supp. 2001). The AACWA provides federal assistance to the states in connection with, among other things, foster care expenses. In order to receive such federal funding, states are required to submit for the approval of the Secretary of Health and Human Services a “State plan” containing features described in 42 U.S.C. § 671.

Though the Plaintiffs have not attempted to clarify the point, in this case the portion of the State plan that might be the relevant “contract” language giving rise to Count Twelve would be found in § 671(a)(10). That paragraph states as follows:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which-

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes.

42 U.S.C. § 671(a)(10).

There has been considerable litigation and even congressional action on the question of whether there is any private right of action under § 671(a)(15), the portion of the statute relating to State plan requirements that address the need to make reasonable efforts to preserve and reunify families. Suter v. Artist M., 503 U.S. 347 (1992) addressed a class-action by plaintiffs seeking declaratory and injunctive relief under 42 U.S.C. § 671(a)(15) and concluded that under that subsection of the AACWA there was no private right of action. 503 U.S. at 358. However, responding to Suter, in 42 U.S.C. 1320a-2 Congress provided:

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2. Thus, Suter does not provide a foolproof shortcut for the private-cause-of-action analysis for subsection (a)(10).

There remains some dispute as to whether the provisions of § 671 other than (a)(15) can be enforced in a private right of action for declaratory and/or injunctive relief. Compare White v. Chambliss, 112 F.3d 731, 739 & n.4 (4th Cir.1997) (recognizing Congress's efforts in 42 U.S.C. § 1320a-2 declaring: 'Suter ... forecloses the argument that section 671(a)(10) of the AACWA provides the source for an enforceable right through section 1983") and Charlie H. v. Whitman, 83 F.Supp.2d 476, 484, 490-91 (D.N.J.,2000) ("Plaintiffs' alleged right to 'placement in foster homes or facilities that conform to nationally recommended professional standards' based upon 42 U.S.C. § 671(a)(10) is too vague and amorphous under the [pre-Suter] test to be enforced pursuant § 1983.") with Brian A. v. Sundquist, 149 F.Supp.2d 941, 947 (M.D.Tenn. 2000) (analyzing § 671 in light of 42 U.S.C. § 1320a-2 declaring: "[T]he Court finds that these provisions of the AA[CW]A--requiring a written case plan with mandated elements and a periodic review system--do create rights which are enforceable under Section 1983") and Jeanine B. v. Thompson, 877 F.Supp. 1268, 1282-84 (E.D. Wis. 1995) (analyzing, post-42 U.S.C. § 1320a-2, the private right of action for § 671(a) subsections other than (15), concluding that a private cause of action did inhere with respect to subsections (2), (3), (7), (10), (11), and (16)). All of this litigation, however, has been centered on actions involving declaratory or injunctive relief. Plaintiffs do not seek declaratory or injunctive relief pertaining to the enforceability of any portion of the statute either under 42 U.S.C. § 671 directly or pursuant to § 1983. I can find no authority for the proposition that 42 U.S.C. § 671 can serve as the basis for a suit for money damages either directly or pursuant to an action brought under § 1983.

Plaintiffs have put forth a theory that they are entitled to monetary damages as the third party beneficiaries of a “contract” between the Department and the federal government. Assuming arguendo that the relationship between the United States of America and the State of Maine under the provisions of 42 U.S.C. § 671 is akin to that of a contractual promisee/promisor, the Act does not abrogate the state’s sovereign immunity. The statute in question was enacted by Congress pursuant to its Article I spending power. See Suter, 503 U.S. at 356. Congress cannot exercise its Article I powers to abrogate the states’ Eleventh Amendment immunity from suit in federal court. Mills v. State of Maine, 118 F.3d 37, 48 (1st Cir. 1997) (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)); see generally Seminole Tribe v. Florida, 517 U.S. 44 (1996). Thus plaintiffs’ attempt to “dress up” the count as a third party beneficiary common law cause of action for breach of contract does nothing to change the fact that the state is immune from a suit for money damages arising under this spending-power statute.

C. State Law Tort Claims

The remaining state law claims against the Department all are based upon tort theories of liability. Pursuant to the Maine Tort Claims Act governmental entities, including agencies and departments of the State as defined in 14 M.R.S.A. § 8102(4), are subject to suit only if the complained of conduct falls within one of the four exceptions enumerated in 14 M.R.S.A. § 8104-A. Those four exceptions involve: (1) the ownership, maintenance or use of vehicles, machinery, and equipment; (2) negligent acts or omissions in the construction, operation, or maintenance of public buildings; (3) discharge of pollutants; and (4) negligent acts or omissions in road construction, street cleaning, or repair. 14 M.R.S.A. § 8104-A. None of the exceptions are implicated by

this lawsuit. The Department is entitled to dismissal of the state tort claims brought against it.

Conclusion

Based upon the foregoing, I recommend that the court **GRANT** the motion to dismiss brought by the Department of Human Services and dismiss so much of this complaint as names the State of Maine, Department of Human Services, as a defendant.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated April 24, 2002

STNDRD

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 01-CV-224

MARR v. HS, ME DEPT, et al
11/07/01

Filed:

Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Question
Dkt# in other court: None
Cause: 42:1983 Civil Rights Act

Jury demand: Both
Nature of Suit: 440
Jurisdiction: Federal

CHRISTY MARR, Individually and
as Personal Representative of
LOGAN MARR
 plaintiff

CHARLES CLIFTON FULLER, III,
ESQ.
[COR LD NTC]
THE ATTORNEYS OFFICE, P.A.
15 MAIN STREET, 2ND FLOOR

BELFAST, ME 04915
(207) 338-5461

v.

MAINE DEPARTMENT OF HUMAN
SERVICES
defendant

ANDREW S HAGLER
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6, AUGUSTA, ME 04333-0006
626-8800

JOHN DOE 1-10
defendant

JANE DOE 1-10
defendant

XYZ CORPORATIONS 1-3
defendant

ALLISON PETERS
defendant

ANDREW S HAGLER
(See above) [COR LD NTC]

CHARLES A. HARVEY, JR.
[COR LD NTC]
ROBERT S. FRANK, ESQ.
[COR]
HARVEY & FRANK
TWO CITY CENTER, P.O. BOX 126
PORTLAND, ME 04112
207-775-1300

MARGARET MARCOTTE
defendant

EDWARD R. BENJAMIN, JR.
[COR LD NTC]
THOMPSON & BOWIE
3 CANAL PLAZA, P.O. BOX 4630
PORTLAND, ME 04112
774-2500
ANDREW S HAGLER
(See above) [COR LD NTC]

RAY DOUCETTE
defendant

ANDREW S HAGLER
(See above) [COR LD NTC]

KAREN WESTBURG
defendant

ANDREW S HAGLER
(See above) [COR LD NTC]

KEVIN CONCANNON
defendant

JONATHAN W. BROGAN, ESQ.
[COR LD NTC]
NORMAN, HANSON & DETROY
415 CONGRESS STREET, P. O. BOX 4600 DTS
PORTLAND, ME 04112
774-7000

ANDREW S HAGLER
(See above) [COR LD NTC]

LAWRENCE J IRWIN, ESQ

E. JAMES BURKE

defendant	[COR LD NTC] 621 MAIN STREET, LEWISTON, ME 04240 783-4050
SUE KIEFER defendant [term 01/18/02]	THAD B. ZMISTOWSKI, ESQ. [term 01/18/02] [COR LD NTC] EATON, PEABODY, BRADFORD & VEAGUE P. O. BOX 1210, BANGOR, ME 04402-1210 947-0111
MAINE CHILDRENS HOME FOR LITTLE WANDERERS defendant [term 01/18/02]	THAD B. ZMISTOWSKI, ESQ. [term 01/18/02] (See above) [COR LD NTC]
SALLY SCHOFIELD defendant	
MARGARET MARCOTTE cross-claimant	EDWARD R. BENJAMIN, JR. [COR LD NTC] THOMPSON & BOWIE, 3 CANAL PLAZA P.O. BOX 4630, PORTLAND, ME 04112 774-2500 ANDREW S HAGLER [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6 AUGUSTA, ME 04333-0006 626-8800
v. SALLY SCHOFIELD cross-defendant KAREN WESTBURG cross-claimant	ANDREW S HAGLER [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6 AUGUSTA, ME 04333-0006 626-8800
v. SALLY SCHOFIELD cross-defendant	
KEVIN CONCANNON cross-claimant	JONATHAN W. BROGAN, ESQ. NORMAN, HANSON & DETROY 415 CONGRESS STREET P. O. BOX 4600 DTS PORTLAND, ME 04112 774-7000 ANDREW S HAGLER [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6

AUGUSTA, ME 04333-0006
626-8800

v.
SALLY SCHOFIELD
cross-defendant

RAY DOUCETTE
cross-claimant

ANDREW S HAGLER
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800

v.
SALLY SCHOFIELD
cross-defendant

ALLISON PETERS
cross-claimant

ANDREW S HAGLER
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800

CHARLES A. HARVEY, JR.
[COR LD NTC]
ROBERT S. FRANK, ESQ.
[COR]
HARVEY & FRANK
TWO CITY CENTER
P.O. BOX 126
PORTLAND, ME 04112
207-775-1300

v.
SALLY SCHOFIELD
cross-defendant